IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-884

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPHINE M. POWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a statute prohibiting the mailing of pistols, revolvers and other firearms capable of being concealed on the person is unconstitutionally vague as applied to sawed off shotgun and other similar short barreled rifles.

STATEMENT

Respondent has no particular quarrel with the petitioner's statement of the case except that much of petitioner's statement is immaterial to the resolution of the question presented.

Respondent was indicted on a single count of mailing a firearm capable of concealment on the person, in violation of 18 U.S.C. 1715. The firearm that she allegedly mailed was a shotgun with a modified barrel and a modified stock. The shotgun was approximately twenty-two (22) inches long and the barrel measured approximately ten (10) inches. (A.96) The weapon is large and bulky. (A.101) An agent from the Bureau of Alcohol, Tobacco and Firearms in Spokane, while admitting that he was not an expert in firearms, did testify that the only two ways that he knew of to conceal a weapon as large as the one in question, would be to place the weapon under an outer garment such as an overcoat, or inside a pair of trousers. (A.96) Both methods of concealment would leave large bulges. (A.97) The agent testified further that almost any type of gun could be concealed. (A.97)

After a jury trial Respondent was convicted of violating 18 U.S.C. 1715 and sentenced to a term of two years imprisonment.

The Court of Appeals reversed the conviction, holding that the portion of the statute (18 U.S.C. 1715) making it unlawful to mail "firearms other than pistols and revolvers capable of being concealed on the person" was not language of sufficient constitutional definity to adivse persons of common experience and intelligence that it was unlawful to mail sawed off shotguns.

Contrary to the petitioner's suggestion in its statement of the case, (page 5 of Petitioner's Brief), the Court of Appeals did not invalidate the "other firearms" portion of 18 U.S.C. 1715 on its face, but, in fact, invalidated the "other firearms" prohibition "as it might relate to sawed off shotguns" (Pet. App. 2a) and inferentially, at least, as it might relate to other weapons similar to sawed off shotguns.

In light of its opinion the Court of Appeals did not reach respondent's other seven assignments of error basically relating to the admissibility of handwriting exemplars, and welfare records introduced at trial.

ARGUMENT

Initially, the question presented to this Court should be placed in its proper perspective. 18 U.S.C. 1715 was not voided on its face, as petitioner so strenuously argues in its Brief.

A fair and careful reading of the opinion of the Court of Appeals reveals that the statute was voided not on its face, but as applied to the respondent, and sawed off shotguns specifically, and similar short weapons generally.[1]

The respondent did not mount a facial challenge to the statute. She only challenged the statute's lack of certainty as the statute applied to large and bulky shoulder weapons such as the sawed off shotgun

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[1] The Court of Appeals held that although little question can be raised as to the concealability of pistols and revolvers, the statutory prohibition "as might relate to sawed off shotguns" is not so readily recognizable. The opinion should be read to invalidate the statute as applied to respondent and not invalidating the statute on its face.

connected with this case. Had respondent been convicted of mailing a pistol or revolver, and on appeal claimed that the *other firearm* provision of the statute was constitutionally uncertain, then petitioner's *jus tertii* standing argument (or in this case, lack of standing) would have merit. However, that not being the case, petitioner's analysis of the case at Bar as being a facial attack of the statute (Brief 8-13) offers little assistance to the resolution of the question presented.[2] Petitioner argues that since the respondent's activity is clearly prohibited within the statute, then petitioner may not contend that the statute is or may be overly broad as applied to others. In that argument petitioner assumes as fact the very issue of this appeal; that is, does the statute clearly apply to the respondent? Does the statute offer to the respondent fair warning of the criminality of her own conduct. Respondent contends and the Court of Appeals so held that the statute does not provide such warning.

Since this statute is not being attacked facially by one clearly within its prohibition, the question then, is not whether "pistols, revolvers and other firearms capable of being concealed" provides *any* discernible area of proscription, for indeed, it does when referring to the case of pistols and revolvers and other firearms

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[2]Petitioner argues that since the statute does apply to respondent's conduct, then a lesser standard of certainty will apply to this statute suggesting that the statute would not be void from vagueness *unless* the statute regulated some first amendment freedoms (*Coates v. City of Cincinnati*, 402 U.S. 611), or unless the statute was *so vague* that no standard of conduct is specified at all; therefore leaving open the widest conceivable inquiry, the scope of which no one can forsee. Citing *U.S. v. Cohen Grocery, 255* U.S. *81.*

of the similar size of pistols and revolvers, but the question, moreover, is whether the language of this statute is sufficiently certain to prohibit the mailing of weapons like a bulky sawed off shotgun approximately two feet in length.

We must then synthesize from the fabric of the law of vagueness a standard of certainty. The verbal expression of this standard of certainty required in penal statutes is less difficult than the application of that standard to a particular case.[3]

Mr. Sutherland, in *Connally v. General Construction Co.*, 269 U.S. 385, aptly expressed the general standard of certainty required in penal statutes when he wrote:

> "...that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized rule; consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Connally v. General Construction Co., Supra*, at 391.[4]

The language of the statute questioned at Bar, must be tested against this often quoted standard of

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[3]See *Winters v. New York* 333 U.S. 507, 518 (1947) where the Court required three oral arguments before applying the standard to that case.

[4]In accord with the expression in *Lanzetta v. New Jersey* 306 U.S. 541 (1939) *Winters v. New York, Supra, U.S. v. Harriss*, 347 U.S. 612, *Herndon v. Lowry*, 301 U.S. 242.

certainty.[5] Indeed, there is sound reasoning behind such a requirement of certainty in criminal statutes. Vague or uncertain laws offend several important values. First, vague statutes provide no guide by which men can steer between lawful and unlawful conduct. *Grayned v. City of Rockford*, 408 U.S. 104. Second, vague laws are a breeding ground for arbitrary and discriminatory enforcement and impermissibly delegate to police; judges, and juries the resolution of legislative policy; often on an ad hoc and subjective basis. *Grayned v. City of Rockford, Supra.*

However, the difficulty of vagueness law lies not with the concept but with its application. It is often a difficult decision to determine when and where to draw the line between lawful and unlawful conduct. Because of this difficulty in application, Courts will often attempt to balance the vagueness of the statute against the social desirability of the particular legislative policy which the Court believes the statute is meant to reach.[6] However, such a balance would be improper. An application of the vagueness doctrine by result is improper and lends itself to a subjective standard. The Court must, instead, resort to some objective criteria when determining the breadth of a penal statute. Respondent contends that Section 1715, when applied

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[5] Petitioner suggests that since this is not a first amendment case then a standard even less than that found in the Connally case should apply. However, Connally itself was not a first amendment case. In first amendment cases a test more strict than that in Connally would apply.

[6] Petitioner seems to argue this 'result oriented application.' Respondent's actions should be unlawful according to petitioner therefore, we should relax the level of certainty required to include respondent's activity.

to sawed off shotguns and weapons similar in size, does not pass the objective test of certainty set forth in the Connally case.[7]

Section 1715 prohibits the mailing of pistols, revolvers and other firearms capable of being concealed on the person. Applying the principles of statutory construction[8] the more general language of the statute (firearms), will be modified and limited by the more specific language of the statute (pistols and revolvers). A reasonable construction of the statute would then dictate that the scope of conduct proscribed is the mailing of concealable firearms such as pistols and revolvers.

The word firearms is not such a technical word that it would offer any restrictive definition in and of itself. Neither does the word firearm have any well known common law meaning. In fact, the Supreme Court of Colorado, when interpreting the word firearm in a similar statute, concluded that its meaning would not include sawed off shotguns and other shoulder type weapons. *Cokley v. People* 450 P.2d 1013 (Colorado

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[7]The decisions upholding statutes challenged as vague seem to center on the fact that the words or phrases used in the challenged statute have either a technical or special meaning well enough known to enable those within the reach of the statute to correctly discern their meaning; or the words or phrases have generally known common laws meaning. *Connally v. General Construction Co.* 269 U.S. 385.

[8]The ejusdem generis principle of statutory construction sets forth this rule. The principle is not used, as petitioner argues, to defeat the meaning of 1715. Moreover, it is used as a guide of statutory construction to determine the meaning of 1715 as presently written.

Sup. Ct. 1972).[9] Therefore, the use of the word firearm does little to remove the uncertainty of the statute.

Furthermore, the language "capable of being concealed on the person," does not, in and of itself, offer a discernible standard. The Court of Appeals indicated that when they asked;

> "Did Congress intend that this 'person' be the person mailing the firearm, the person receiving the firearm, or, perhaps an average person, mail [sic] or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season" (Pet. App. 2a-3a)

The Court of Appeals vividly expressed the inability of the language "capable of being concealed on the person" to offer some discernible standard.

Therefore, the pertinent language of the statute does not have any clear or well known meaning and does not in and of itself provide any standard of certainty sufficient to meet the requirements of the Connally case. In fact, the only language in the statute having such a common meaning and offering any discernible standard is the phrase "pistols and revolvers."

It seems then from the standpoint of statutory construction the statute would not involve sawed off shotguns. Furthermore, from the standpoint of the definition of the words of the statute, the phrase "firearms capable of being concealed on the person" does not consist of words of technical meaning or

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[9] That is not to say that this Court need adopt the reasoning of the Colorado Court. However, the very fact that the Colorado Supreme Court would interpret firearms as not including sawed off shotguns would indicate that the words meaning is, at least, given to different interpretations by men of common intelligence.

generally known common law meaning so as to inject into this portion of the statute the required degree of constitutional certainty.

Even the history of the statute does not specifically mention shoulder type weapons. Congress was, in enacting this statute, principally concerned with prohibiting the mailing of pistols and revolvers. It is the pistol and revolver that are most often used in strong arm robberies and other violent crimes. They are easily concealed and easily transported by the mails. If Congress had intended that the statute prohibit the mailing of modified shotguns and other similar shoulder weapons, Congress could have easily drafted the statute along those lines. Indeed, Congress has drafted other legislation that has specifically defined these types of weapons.[10]

Finding a discernible standard in the language "firearms capable of being concealed" presents many of the same problems that the Court found in interpreting the phrase "current rate of wages" in *Connally v. General Construction Co., Supra.* There the Court wrote,

> "The "current rate of wages" is not simple, but progressive—from so much (the minimum) to so much (the maximum), including all in between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer."

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[10]That is not to argue that the statute is vague because there was more precise language available to Congress. The argument is offered only to demonstrate that Congress is mindful of the distinction between handguns and shoulder weapons.

The statute at Bar has a similar defect. Petitioner argues that there is at least some standard in 1715; presumably found between pistols (the minimum) and (inferentially at least) full sized rifles and shotguns (the maximum), and that respondent finds herself somewhere in between. However, without language in the statute drawing a finer line than this, what is meant by "firearms capable of being concealed on the person" is incapable of any definite answer. It would only be left for the respondent and others to speculate or conjecture as to where the dividing line falls between lawful and unlawful conduct. A statute that requires this kind of speculation is repugnant to the fundamental principles of due process.

This is not a case of degree as was the case of *Nash v. United States* 229 U.S. 373. Before one's fate will depend on estimating rightly as the jury may later estimate in terms of degree, one must first be clearly within the zone of prohibited conduct. An example of degree would be whether or not a specific act of homicide (the prohibited conduct) would amount to first degree murder, second degree murder or manslaughter. In the statute at Bar, sawed off shotguns are not clearly within the statutes proscription, so as to make the question at Bar merely one of degree.

Petitioner argues that specificity in criminal statutes is not necessarily beneficial and therefore, should not be required in every case. While that statement may be true from the standpoint of efficient law enforcement, it is not true from the standpoint of due process. While due process is tolerant of general language in areas where the policy legislated is a difficult concept to

express (e.g. Condition of Peonage),[11] due process is not tolerant of general language in areas capable of more definite conceptualization. Otherwise, general statutes, under the guise of efficient administration of justice, would permit arbitrary and discriminatory enforcement by police and upset a fundamental check and balance of our criminal justice scheme.

It has not been shown here, and could not be shown, that the policy of 18 U.S.C. 1715, was a difficult concept to express, therefore necessitating broad and general language. Congress had little trouble expressing a similar concept in 18 U.S.C. 921, with very precise language.

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[11] Although if a first amendment protected right is at stake even general language is not tolerated. See *Cramp v. Board of Public Instruction* 368 U.S. 278; *Grayned v. City of Rockford, Supra,* (Vagrancy statute); *Papachruston v. City of Jacksonville* 405 U.S. 156.

CONCLUSION

In conclusion then, respondent respectfully submits that the "other firearms capable of being concealed on the person" provision of 18 U.S.C. 1715, as applied to sawed off shotgun and other similar type weapons, does not offer a discernible standard of conduct by which men of ordinary intelligence can fairly estimate the statute's prohibitions, and that portion of the statute is, as applied, unconstitutionally vague and violative of the due process clause of the United States Constitution. It being so, this Court should uphold and affirm the ruling of the Court of Appeals, reversing respondent's conviction.

Respectfully submitted,

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